Petition

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

81-326

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

RUTH M. FENZ, *Petitioner,*

vs.

~~THE SUPREME COURT OF THE STATE OF CALIFORNIA,~~
~~*Respondent,*~~

RICHARD O. BURKE and PATRICIA ANNE BURKE,
~~*Real Parties in Interest.*~~

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

DENNIS L. WOODMAN
211 Marshall Street, Suite A
P. O. Box 5343
Redwood City, CA 94063
Telephone: (415) 367-1316
Counsel for Petitioner

WOODMAN & WOODMAN, a P.C.
211 Marshall Street, Suite A
Redwood City, California 94063
Telephone: (415) 367-1316
Of Counsel

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

May the State of California terminate petitioner's right to pay her debt, to exempt her residence from execution by recording a homestead, and to exercise her right to redeem her residence from Sheriff's levy to satisfy a judgment obtained against her ailing husband based upon the same debt, *without* giving any notice to her of any of the proceedings leading to this result?

TABLE OF CONTENTS

	Page
Question presented	i
Opinions below	1
Jurisdiction	2
Constitutional provisions and statutes involved	2
Statement of the case	9
Reasons for granting the writ	14
I	
A wife has rights of her own which allow her to protect her home from sheriff's levy sale on a judgment obtained against her incapacitated husband for non-payment of a community debt	14
II	
The sheriff's levy and sale of Mr. Fenz' interest in the home was void because it was state action which affected significant interests in the home owned by Mrs. Fenz without affording her notice required by the due process clause of the 14th Amendment	16
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases

	Page
Blackburn v. Drake (1963) 211 C.A.2d 806	15
Covey v. Town of Somers (1955) 351 U.S. 141; 76 S. Ct. 724	17
Eldridge v. Wright (1880) 55 Cal. 531	15
Emerson v. Yosemite Gold Mining & Mill. Co. (1906) 149 C. 50	15
Endicott Co. v. Encyclopedia Press, 266 U.S. 285	19
Fry v. Bihr (1970) 6 C.A.3d 248	15
Fuentes v. Shevin, 407 U.S. 67	13, 17
Griffin v. Griffin, 327 U.S. 220	13, 16, 17
Johnson v. Brauner (1955) 131 C.A.2d 713	15
Mullane v. Central Hanover Bank and Trust (1949) 339 U.S. 306; 70 S. Ct. 652	17
Sniadach v. Family Finance Corp. (1968) 395 U.S. 337; 89 S. Ct. 1820	17
So. Cal. Lumber Co. v. McDowell (1894) 105 C. 99	15
Viotti v. Giomi (1964) 230 C.A.2d 730	15

Constitution

United States Constitution, Fourteenth Amendment.... 2, 10, 13, 16, 18, 19, 20

Table of Authorities Cited

Statutes

Page

California Civil Code:

Section 1237 ..... 5, 15
Section 1240 ..... 5, 15
Section 1254 ..... 5, 16
Section 1255 ..... 5, 16
Section 1256 ..... 6, 16
Section 1260 6
Section 1260(1) 15, 16
Section 1261 ..... 6, 7
Section 1261(1) 15
Section 5116 7
Section 5125 ..... 7, 8, 15
Section 5127 ..... 8, 9, 15

California Code of Civil Procedure:

Section 692 ..... 2, 3, 4, 14
Section 700a 4, 15
Section 701 ..... 5, 15

28 U.S.C.:

Section 1257 2
Section 1257(3) 2

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

RUTH M. FENZ, *Petitioner,*

vs.

THE SUPREME COURT OF THE STATE OF CALIFORNIA,
Respondent;

RICHARD O. BURKE and PATRICIA ANNE BURKE,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Ruth M. Fenz, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California entered on May 20, 1981, which judgment denied a Petition for Hearing, without opinion, after decision and judgment of the Court of Appeal of the State of California, First Appellate District, Division One.

OPINIONS BELOW

The opinion and order denying Petition for Rehearing of the Court of Appeal and the judgment of the Supreme Court denying hearing are unreported and are printed in Appendix A hereto.

JURISDICTION

The Supreme Court of California denied a Petition for Hearing without hearing on May 20, 1981. The Petition for Writ of Certiorari is filed within 90 days of the entry of the aforesaid judgment. The jurisdiction of the court is invoked under Title 28, United States Code, Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV

> "No state shall deprive any person of life, liberty, or property without due process of law."

28 USC Section 1257:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By Writ of Certiorari, where the validity of a state Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

California Code of Civil Procedure Section 692:

> "Before the sale of property on execution, notice thereof must be given as follows:
>
> 3. In case of real property or a leasehold estate therein: by posting a similar notice particularly describing the property at least 20 days before the

date of sale, in one public place in the city where the property is to be sold, if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation published in the city in which the property or the real property in which such a leasehold estate was demised or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation published in the judicial district in which the property or some part thereof is situated, or in case no newspaper of general circulation is published in the city or judicial district, as the case may be, in some newspaper of general circulation published in the county in which the property or some part thereof is situated and at least 20 days before the date of sale by mailing by certified mail a notice of the time and place of sale to the judgment debtor at his business or residence address last known to the judgment creditor or his attorney or delivering such notice to the judgment debtor. It shall be the duty of the party delivering an execution to an officer for levy to furnish the information required by the levying officer to comply with the provisions of this subdivision. Where real property is to be sold under execution upon a judgment a copy of said notice shall be posted in some conspicuous place on the property to be sold, at least 20 days before date of sale, and where a leasehold estate in real property is to be sold under execution upon a judgment a copy of said notice shall be posted in some conspicuous place on the real property in which such a leasehold estate was demised, at least 20 days before date of sale. In addition to particularly describing the property, the notice shall describe the

property by giving its street address, if any, or other common designation, if any; but, if a legal description of the property is given, the validity of the notice shall not be affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted."

California Code of Civil Procedure Section 700a:

"(a) Sales of personal property, and of real property, when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain:

1. A particular description of the real property sold;

2. The price bid for each distinct lot or parcel;

3. The whole price paid;

4. If the property is subject to redemption, the certificate must so declare, and if the redemption can be effected only in a particular kind of money or currency, that fact must be stated.

(b) If the property is subject to redemption the officer shall inform the judgment debtor, by certified mail or personal service, of his right of redemption. Failure to give such notice within one week after the sale shall make the officer liable to the judgment debtor for actual damages, in addition to a penalty of one hundred dollars ($100)."

California Code of Civil Procedure Section 701:

"Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners."

California Civil Code Section 1237:

"The homestead consists of the dwelling house in which the claimant resides, together with outbuildings and the land on which the same are situated . . ."

California Civil Code Section 1240:

"The homestead is exempt from execution or forced sale except as in this title provided."

California Civil Code Section 1254:

"If, from the report, it appears to the judge that the land claimed exceeds in value, over and above all liens and encumbrances thereon, the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution."

California Civil Code Section 1255:

"At such sale, no bid shall be received unless it exceeds the amount of the homestead exemption plus the aggregate amount of all liens and encumbrances on the property."

California Civil Code Section 1256:

"If the sale is made, the proceeds thereof must be applied in the following order of priority—first, to the discharge of all liens and encumbrances, if any, on the property, second, to the homestead claimant to the amount of the homestead exemption, third, to the satisfaction of the execution, the balance, if any, to the homestead claimant."

California Civil Code Section 1260:

"Homesteads may be selected and claimed:

1. By any head of a family, of not exceeding twenty thousand dollars ($20,000.00) in actual cash value, over and above all liens and encumbrances on the property at the time of any levy of execution thereon.

. . . . .

3. By any other person of not exceeding ten thousand dollars ($10,000.00) in actual cash value, over and above all liens and encumbrances."

California Civil Code Section 1261:

"The phrase 'head of a family,' as used in this title, includes within its meaning:

1. The husband, when the claimant is a married person.

2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either:

(a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband;

(b) A minor brother or sister, or the minor child of a deceased brother or sister;

(c) A father, mother, grandfather, or grandmother;

(d) The father, mother, grandfather, or grandmother of a deceased husband or wife;

(e) An unmarried sister, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves."

California Civil Code Section 5116:

"The property of the community is liable for contracts of either spouse which are made after marriage prior to or on or after January 1, 1975."

California Civil Code Section 5125:

"(a) Except as provided in subdivisions (b), (c), and (d) and sections 5113.5 and 5128, either spouse has the management and control of the community personal property, whether acquired prior to or on or after January 1, 1975, with like absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse.

(b) A spouse may not make a gift of community personal property, or dispose of community personal property without a valuable consideration, without the written consent of the other spouse.

(c) A spouse may not sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without written consent of the other spouse.

(d) A spouse who is operating or managing a business or an interest in a business which is community per-

sonal property has the sole management and control of the business or interest.

(e) Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property."

California Civil Code Section 5127:

"Except as provided in Sections 5113.5 and 5128, either spouse has the management and control of the community real property, whether acquired prior to or on or after January 1, 1975, but both spouses either personally or by duly authorized agent, must join in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed prior to January 1, 1975, and the sole lease, contract, mortgage, or deed of either spouse, holding the record title to community real property to a lessee, purchaser, or encumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid if executed on or after January 1, 1975. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of either spouse alone, executed by the spouse alone, shall be commenced after the expiration of one year from the filing for record of such instrument in

the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect."

STATEMENT OF THE CASE

Petitioner and her since deceased husband owned in joint tenancy and resided in a duplex residence. In 1974, her husband incurred a debt which subjected her interest in the duplex to execution under California community property law. In late 1974, the creditor chose to file suit against Mr. Fenz alone and obtained a judgment for $4,000.00 against him without any notice to petitioner. The creditor levied against Mr. Fenz' interest in the duplex, and the State of California, acting through the Sheriff of San Mateo County, sold Mr. Fenz' interest to the creditor who was the only bidder. The Sheriff issued a certificate of sale. The levy and sale was done without any notice to petitioner. Mr. Fenz made payments on account of the judgment and they were accepted by the creditor. Slightly in excess of one year passed during which Mr. Fenz became gravely ill, was hospitalized, and later died. Just before death, the creditor sold the certificate of sale to real parties in interest for payoff of the $3,500.00 balance that was still outstanding on the judgment. Real parties presented the Sheriff's certificate of sale and the State, acting through the Sheriff, conveyed Mr. Fenz' interest

in petitioner's residence to real parties in interest. All of these actions concerning the debt and the State action taken against her residence were accomplished without notice to petitioner. The effect of the State action was to terminate petitioner's substantial rights under California law to 1) pay the debt to protect her own ownership interest (as opposed to Mr. Fenz') in the residence, 2) to exempt the residence from levy by recording a homestead after filing of suit and prior to sale, and 3) to redeem within one year of levy and sale.

Had petitioner known of the pendency of the proceedings, she would have exercised one or more of these rights which would have precluded the termination of her husband's interest and the resultant loss of his interest and her right to maintain the duplex as her residence.

This action was originally filed on April 27, 1977 by Ruth M. Fenz against Richard O. Burke and Patricia Anne Burke. In the complaint and subsequent amendments, petitioner prayed for Declaratory Relief and to Quiet Title to Real Property, based upon the State of California having taken real property in violation of petitioner's right of due process guaranteed by the 14th Amendment to the U. S. Constitution. She alleged that such property was taken as a result of the State's depriving her of significant rights without notice of the State proceedings, the exercise of which rights would have precluded the State from terminating her ailing husband's interest in petitioner's residence.

The relevant facts are:

John W. Fenz and petitioner Ruth M. Fenz were husband and wife who owned as joint tenants, the duplex commonly known as 101-107 Elm Street, San Carlos, California (C.T. 186:27-187:4). During all relevant periods, petitioner occupied the duplex and used it as her principal place of residence (C.T. 20:27-21:2; 36:1-3; 90:26-91:7).

Mr. Fenz incurred a community debt on behalf of himself and Mrs. Fenz (C.T. 36:5-7).

Baron & Chestney, Inc., filed suit against Mr. Fenz in the Municipal Court of San Mateo County, Southern Judicial District, to collect this community debt, and a judgment was obtained against John W. Fenz for $3,938.80 (C.T. 187:9-12).

A writ of execution was issued on the judgment, and, on May 6, 1975, the sheriff of San Mateo County sold John W. Fenz' undivided interest as to one-half of the duplex to Baron & Chestney, Inc. (C.T. 36:24-28) for $4,127.63. This figure was grossly inadequate in comparison to the value of the interest in the property which was purchased (C.T. 209:24-210:4).

Baron & Chestney, Inc. thereafter assigned their interest in the sheriff's certificate of sale to respondents Burke, who paid a grossly inadequate sum, considerably less than the $4,127.63 bid by Baron & Chestney, Inc. (C.T. 37:5). The sheriff of San Mateo County conveyed the real property to the Burkes by a sheriff's indenture deed, recorded November 12, 1976 (C.T. 187:14-21).

During the time period after May 6, 1975, Mr. Fenz was incapacitated (C.T. 227; 229; 230).

John W. Fenz died on February 15, 1977 (C.T. 188:18), and shortly thereafter, his wife, the petitioner, contrary to the Appellate Court finding (App. A:5-6), first learned of the Baron & Chestney suit against Mr. Fenz, the judgment obtained thereon, the sheriff's sale, and the subsequent deed to the Burkes. The fact of lack of knowledge was alleged in the trial court and was evidenced in the record on appeal (C.T. 2:1-3:8;40:12-17; 93:14-17; 188:1-6). By the time petitioner found out, the statutory time to declare a homestead and redeem the property had run, thereby making it impossible for petitioner to either file a Declaration of Homestead or to redeem the property (C.T. 37:2-5).

This failure to provide petitioner with notice deprived her of valuable inheritance and ownership rights without due process of law, in that petitioner had no notice and opportunity to be heard in order to protect her rights of redemption and homestead afforded by statute in the State of California (C.T. 188:8-13).

Mrs. Fenz had sufficient non-exempt personal property and other real estate sufficient to satisfy the judgment (C.T. 177:19-25).

Immediately after first obtaining knowledge of the foregoing facts, petitioner offered to redeem the property from the Burkes but was refused (C.T. 191:15-20).

Real parties in interest, the Burkes, filed numerous demurrers, all of which were sustained (C.T. 30; 79; 184),

the last was sustained without leave to amend (C.T. 267). A notice of entry of judgment dismissing the complaint was entered on August 11, 1978 (C.T. 274).

Notice of appeal was filed on September 26, 1978, and appellant appealed from the dismissal of her suit after the trial court sustained the last demurrer without leave to amend.

Petitioner raised the violation of her rights under the due process clause of the 14th Amendment to the U.S. Constitution pointing to the termination, without notice, of her own above-referenced rights to protect her residence from forced sale by the State in her opening brief (AOB: 10-16) and in her closing brief (ACB:7-17). The Court of Appeal, citing *Fuentes v. Shevin*, 407 U.S. 67, and other U.S. Supreme Court cases determined that petitioner was not denied due process under the 14th Amendment to the U. S. Constitution because it was her ailing husband's interest that was levied against and taken by the State of California and not her own (APP. A:6-9). The Appellate court decision did not address applicability of *Griffin v. Griffin*, 327 U.S. 220 cited by petitioner, and the termination without notice by the State of petitioner's independent rights to:

1. Pay the debt to protect her own ownership interest (as opposed to her ailing husband's);

2. To exempt the home from levy and forced sale after filing of suit;

3. To redeem under statute within one year of levy and sale.

On a petition for rehearing, petitioner raised these oversights and raised the effect that notice of the proceedings would have allowed petitioner to attend to the affairs of her incapacitated husband and thus protect her home from forced sale (PRH:6-7). The Court of Appeals summarily denied the petition (App. A:13).

Petitioner next filed a petition for hearing before the Supreme Court of the State of California, raising substantially the same federal constitutional issues as were raised before the Appellate Court (PH:5-10). The State Supreme Court summarily denied the petition (App. A:14).

The California courts have therefore also upheld the constitutionality of the statutory procedures directing the giving of notice in California Code of Civil Procedure Section 692, even though it didn't require notice be given to a co-owner spouse living in the premises levied against.

REASONS FOR GRANTING THE WRIT

I

A WIFE HAS RIGHTS OF HER OWN WHICH ALLOW HER TO PROTECT HER HOME FROM SHERIFF'S LEVY SALE ON A JUDGMENT OBTAINED AGAINST HER INCAPACITATED HUSBAND FOR NON-PAYMENT OF A COMMUNITY DEBT

In California, the property of the community is liable for contracts of either spouse which are made after marriage (C.C. 5116). Mrs. Fenz' earnings and all of the joint personal and real property owned jointly by her with her ailing husband, literally everything she owned or would acquire, was available at the time of levy in this case to

satisfy the debt. Mrs. Fenz was given equal power in 1975 to manage the personal and real property owned by her and her husband (C.C. Sections 5125, 5127). She therefore had the right and ability to use available property to pay the debt due Baron & Chestney, even though she was not named as a party to the collection suit.

Mrs. Fenz also asserts that she was independently entitled by California statute to redeem her husband's interest in the home from the sheriff's levy because she is his "successor in interest" under the terms of the joint tenancy deed (C.C.P. Sections 700a, 701; *Eldridge v. Wright* (1880) 55 Cal. 531; *So. Cal. Lumber Co. v. McDowell* (1894) 105 C. 99; *Emerson v. Yosemite Gold Mining & Mill. Co.* (1906) 149 C. 50; *Fry v. Bihr* (1970) 6 C.A. 3d 248).

Mrs. Fenz also had a statutory right, under California law, to homestead her home. A homestead is a statutory right and may be selected by any head of a family (C.C. Section 1260(1)) in a dwelling resided in by claimant, and includes land and outbuildings situated thereon (C.C. Section 1237). A head of family is defined as the husband or wife, when the claimant is a married person (C.C. Section 1261(1); *Blackburn v. Drake*, 211 C.A.2d 806, 818). The homestead exemption extends to the entire interests of both spouses in the property held by them as joint tenants (*Johnson v. Brauner*, 131 C.A.2d 713). It can also be claimed in property containing more than one residential accommodation (*Viotti v. Giomi*, 230 C.A.2d 730).

The statutory effect of a claim of homestead prior to levy in this case would have been to protect such property from forced execution sale (C.C. Section 1240), only allow-

ing such forced sale when an appraisal indicated its value exceeded all encumbrances and the exemption amount (C.C. Section 1254), and to have precluded a sale for less than such amount (C.C. Section 1255). The value of such a homestead, prior to levy in this case, was $20,000.00 (C.C. Section 1260(1), and the declarant was entitled to such sum before any sums of money were payable to the levying judgment creditor (C.C. Section 1256).

II

THE SHERIFF'S LEVY AND SALE OF MR. FENZ' INTEREST IN THE HOME WAS VOID BECAUSE IT WAS STATE ACTION WHICH AFFECTED SIGNIFICANT INTERESTS IN THE HOME OWNED BY MRS. FENZ WITHOUT AFFORDING HER NOTICE REQUIRED BY THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

Mrs. Fenz urges the court to determine that her right to pay the community debt with available assets, her right to redeem her home from the sheriff's levy, and her right to homestead the property are all significant property interests because the exercise of any of them would have completely avoided the ultimate state action of transferring Mr. Fenz' interest to the real parties in interest, Mr. and Mrs. Burke.

The court's attention is drawn to the following language contained in *Griffin v. Griffin* (327 U.S. 220; 90 L.Ed. 635; 66 S.Ct. 556):

> "(b)ecause of the omission (of notice of the proceedings to docket the judgment), and to the extent that petitioner was thus deprived of an opportunity to raise defenses otherwise open to him under the law of New

> York against the docketing of judgment for accrued alimony, there was a want of judicial due process, and hence want of that jurisdiction over the person of petitioner prerequisite to the rendition of a judgment in personam against him. (*Griffin*, supra 327 U.S. 220, at P. 228; 90 L.Ed. 635 at P. 640)."

The United States Supreme Court has required notice which must be reasonably calculated under all the circumstances to appraise interested parties of the pendency of an action involving their property rights and to afford such parties an opportunity to present objections (*Mullane v. Central Hanover Bank and Trust* (1949) 339 U.S. 306, 314; 70 S. Ct. 652, 657; *Covey v. Town of Somers* (1955) 351 U. S. 141, 146; 76 S. Ct. 724, 727). These cases have been followed by many others including *Sniadach v. Family Finance Corp.* (1968) 395 U.S. 337, 341; 89 S. Ct. 1820, 1822 (pre-judgment garnishment without notice plus opportunity to be heard drives a wage earning family up the wall and violates the fundamental principles of due process) and *Fuentes v. Shevan* (1972) 407 U.S. 67, 83; 92 S. Ct. 1983, 1995 (due process requires that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake, that justifies postponing the hearing until after the event).

Petitioner is aware of no case determining the degree of significance under the due process clause of interests such as Mrs. Fenz. Unfortunately, the Court of Appeal did not address these issues even though petitioner brought the issues to the Appellate Court's attention in her opening

brief (pages 10-16), her closing brief (pages 7-17). She also brought the omission to the attention of the Appellate Court in her Petition for Rehearing (p. 6), and she brought the omission to the attention of the Supreme Court in the petition for hearing (p. 8).

It is submitted that each of the foregoing rights of petitioner are significant property rights, personal to her, which are entitled to protection under the due process clause, and were impermissibly terminated by the Sheriff's levy sale. As she alleged in the trial court that she did not receive notice sufficient to apprise her of the pendency of the collection suit, or of entry of the judgment against her husband, she was not allowed to exercise her statutory right to redeem the property from the levy sale, to assert her statutory Homestead exemption and to otherwise protect her own statutory and contractual right to inherit her husband's interest in the property, before such property interests were extinguished by state action. It is submitted that she did state a cause of action in the trial court.

The Supreme Court of the State of California, in upholding the Appellate Court decision, refuses to recognize the State's violation of petitioner's due process rights under the 14th Amendment to the U. S. Constitution.

Further, the State Supreme Court in upholding the Appellate Court holds that Mrs. Fenz is not entitled to any notice of the sheriff's execution in supplemental proceedings in satisfaction of the Baron & Chestney judgment because "*due process* does *not* 'require that a defendant who has been granted an oportunity to be heard and has had his day in court, should, after judgment has been rendered

against him, have a further notice and hearing . . .' " (App. A, p. 7). It was brought to the Appellate Court's attention in the Petition for Rehearing (p. 7) that this finding was based upon the mistaken belief that Mrs. Fenz was a party to the prior proceeding. However, she was not a party and had no notice of the Baron & Chestney suit or the sheriff's levy and sale. The Appellate Court has, therefore, omitted from its decision a determination as to the reasonableness of attempts to give notice to Mrs. Fenz prior to affecting the above-mentioned significant property interests. The Appellate Court's reliance upon *Endicott Co. v. Encyclopedia Press* (266 U.S. 285, 288) is misplaced because that case involved defendants who were on notice of the creditor's suit because of having previously been served with summons and complaint. Such was not the case as to Mrs. Fenz.

Finally, it is submitted that this case is an appropriate one to better define the outer limits of "significant property interests" that are protected by the due process clause of the 14th Amendment.

CONCLUSION

Mrs. Fenz had no choice as to her exclusion as a party to the Baron & Chestney suit. Because of this and her resultant lack of knowledge of all of the proceedings pertaining to the Baron & Chestney collection suit, judgment, and sheriff's levy on her home, she was deprived of all opportunity to pay her own debt and protect her home from attack by the State. The action of the State of California terminated substantial interests of hers without which a State levy execution and sale of her ailing husband's inter-

est in her residence could not have occurred. Such interests of petitioner are substantial and are protected by the due process clause of the 14th Amendment.

For these reasons, the Petition for a Writ of Certiorari should be granted, and the State of California should be directed to proceed to trial on the merits of petitioner's claims.

Dated: August 8, 1981.

Respectfully submitted,
WOODMAN & WOODMAN, a P.C.

By DENNIS L. WOODMAN
Attorney for Petitioner

WOODMAN & WOODMAN, a P.C.
Of Counsel

(Appendices follow)

APPENDIX

Appendix A

In the Court of Appeal of the State of California

First Appellate District

Division One

1 Civ. No. 45909

(Super. Ct. No. 211254)

Ruth M. Fenz,
Plaintiff and Appellant,

vs.

Richard O. Burke et al.,
Defendants and Respondents.

[Filed March 20, 1981]

OPINION

Plaintiff Ruth M. Fenz' appeal is from a judgment of dismissal following an order sustaining defendants' demurrer to her *third amended complaint* without leave to amend. Another of her appeals is from a nonappealable order sustaining the demurrer. It will be dismissed. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 64, p. 4078.)

The overall appellate issue is whether the third amended complaint stated a case of action. It was in two counts. The theory of the first was that defendants' execution on an earlier judgment against plaintiff's husband, upon his interest in real property held by them in joint tenancy, constituted "governmental action [which] deprived plaintiff of valuable property without due process of law." The second count's theory was that the execution was void as a

matter of law for failure of defendants, or the sheriff, to satisfy the judgment from plaintiff's husband's nonexempt personal property.

The third amended complaint's first count recited the following: Plaintiff and her husband, John Fenz, were owners of the subject real property, *as joint tenants with right of survivorship.* Defendants had obtained a municipal court judgment against John Fenz alone, in the amount of $3,938.80. On May 6, 1975, "defendants caused the Sheriff of San Mateo County to levy on [John Fenz' interest in] the aforementioned real property in satisfaction of said judgment, and defendants purported to purchase an interest in said real property" by a sheriff's deed. On February 15, 1977, John Fenz died.

"No notice was given by the Sheriff of San Mateo County or any other person to plaintiff, nor did plaintiff receive notice of the aforementioned governmental action prior to its ocurrence, and plaintiff first learned of said governmental action on or about February 22, 1977. [¶] The aforesaid governmental action took property from plaintiff without notice to her and without an opportunity for her to be heard or to protect her interest in said real property, either before or after the state action. The aforesaid governmental action deprived plaintiff of valuable property without due process of law. [¶] Plaintiff has no remedy available to her at law. . . . [¶] The interests of justice require that the court exercise its equitable jurisdiction to allow plaintiff to redeem said property by payment of the balance due upon said judgment, and, upon doing so, that the court declare that the aforementioned Sheriff's Deed purporting to grant an interest in said prop-

erty to defendants to be void because of the lack of due process . . . ."

The third amended complaint's second count, as relevant, alleged:

> "At all times mentioned herein, John Fenz was the owner of sufficient non-exempt personal property to satisfy the aforementioned. . . . [¶] Defendants, prior to and at the time of the levy, well knew, or with the exercise of reasonable diligence could well have known that said John Fenz had sufficient personal property that was not exempt which could have satisfied said judgment upon Sheriff's levy. Notwithstanding said knowledge or the reasonable access to said knowledge, defendants, and each of them, with malice and without just or probable cause and with the intent of injuring or damaging John Fenz, ignored the non-exempt personal property in violation of California Code of Civil Procedure § 682 and, in abuse of California Civil Process, instructed and directed the Sheriff to seize and levy against the aforementioned real estate and to deed John Fenz' interest in said real property to defendants by indenture deed, . . ."
>
> "Plaintiff is informed and believes, and based upon such information and belief, alleges that the interest of John Fenz purchased by defendants in satisfaction of the judgment then owing in the sum of $3,500.00 was valued at more than $15,000.00 over and above all encumbrances against his interest in said real property, and said sum constituted a grossly inadequate purchase price. . . . [¶] John Fenz died on February 15, 1977 and, pursuant to the terms of the aforesaid joint tenancy deed, plaintiff has succeeded to all of John Fenz' right, title, and interest in said real property. By derivative right, plaintiff aserts this cause of action as John Fenz' successor in interest."

> "Defendants levied and obtained title to John Fenz' interest in said real property in order to avoid the requirements of California Code of Civil Procedure § 682 requiring defendants to levy against adequate non-exempt personal property or, in the alternative, said acts were done for the purpose of acquiring a valuable interest in John Fenz' home for a grossly inadequate consideration. . . . [¶] Plaintiff first learned of the aforementioned violations of California Code of Civil Procedure § 682 on or about February 22, 1977, and upon gaining the aforementioned knowledge, plaintiff offered to redeem said property from defendants. Defendants refused said offer to redeem and continue to refuse all offers of redemption. [¶] Plaintiff has no remedy available to her at law."

Additionally, there was before the superior court, at the time of its order sustaining demurrer to the third amended complaint, the following uncontroverted evidence earlier adduced in the action on a motion for summary judgment. Such evidence, appearing in the files of the action, will be deemed to have been judicially noticed by the court. (Verreos v. City and County of San Francisco, 63 Cal.App.3d 86, 106-107; Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn., 18 Cal.App.3d 1023, 1038; Saltares v. Kristovich, 6 Cal.App.3d 504, 511; Able v. Van Der Zee, 256 Cal.App.2d 728, 734; Nulaid Farmers Assn. v. LaTorre, 252 Cal.App.2d 788, 791; Dwan v. Dixon, 216 Cal.App.2d 260, 265; Watson v. Los Altos School Dist., 149 Cal.App.2d 768, 771.)

The purchase price paid at the execution sale of the subject property was precisely the amount due on the municipal court judgment against plaintiff's husband. No

deficiency on the judgment, as ofter occurs, remained. The only served, and appearing, defendants of the instant action were Richard O. Burke and Patricia Anne Burke who had, October 19, 1976, purchased the interest of the unserved defendant, Baron & Chestney, Inc., accruing from the earlier execution sale. At that time, known to defendants Burke, there were of record against the subject real property the following *superior* liens, each held by a different individual or corporate or public entity: (1) First deed of trust recorded October 30, 1968, $31,200; (2) Second deed of trust recorded October 30, 1968, $2,500; (3) County tax lien recorded April 27, 1971, $95.69; (4) Third deed of trust recorded January 5, 1972, $11,000; (5) Judgment recorded April 16, 1972, $707.79; (6) Judgment recorded May 5, 1972, $1,706.55; (7) Judgment recorded October 30, 1972, $477.58; (8) Judgment recorded May 9, 1973, $354.75; (9) Internal Revenue Service tax lien recorded March 10, 1975, $8,620.41. An *inferior* judgment lien in favor of the City and County of San Francisco, recorded January 26, 1976, for $680, was also of record.

Other such uncontroverted evidence, from a declaration of plaintiff, established that: "On May 6, 1975, my husband, John Fenz, owned the following items of non-exempt personal property: 1. Non-exempt wages 1,300.00 2. Rental income 1,200.00 3. Antique silver 1,011.25 4. Used appliances 300.00 5. Wells Fargo bank account 500.00 Total $4,311.25."

And it will be observed that nowhere in the third amended complaint, or in matter judicially noticed, did plaintiff allege a lack of knowledge of defendant Baron & Chestney, Inc.'s judgment against her husband, or of the

existence of any of the above-noted liens against the real property. Nor do we find record support for plaintiff's frequent appellate recitals that the subject property, a two-flat, or apartment, building, had constituted the *home* of plaintiff and her husband. Indeed, many of the factual recitals of her briefs are found wholly unsupported. And although she declares that she could again amend her complaint, this time to state a cause of action on contract or some other theory, the record discloses no trial court application to so amend.

We consider now whether the third amended complaint's first count stated a cause of action. It will be remembered that it was based on the theory that the execution on plainiff's husband's interest in a parcel of real property held by them in joint tenancy constituted "governmental action" depriving plaintiff of valuable property without due process of law.

One is denied due process when, by "governmental action" he or she is arbitrarily deprived by a " 'significant property interest' " without previous and reasonable notice and hearing thereon. (See Fuentes v. Shevin, 407 U.S. 67, 82, 85-26; Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 151-152.)

Plaintiff argues that because she had a *"property interest"* in her husband's joint tenancy holding, *she* (in addition to her husband, the judgment debtor) was entitled to such procedural due process before the joint tenancy was terminated by the execution sale.

We find the argument unpersuasive for reasons we now state.

It is initially noted that California's statutory procedures for enforcement of judgments against judgment debtors have always survived constitutional attack. (See Wyshak v. Wyshak, 70 Cal.App.3d 384, 394; Taylor v. Madigan, 53 Cal.App.3d 943, 961-966; Raigoza v. Sperl, 34 Cal.App.3d 560, 564-566.) *Due process* does *not* "require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take 'notice of what will follow,' no further notice being 'necessary to advance justice.'" (Endicott Co. v. Encyclopedia Press, 266 U.S. 285, 288; Taylor v. Madigan, supra, p. 962.)

California's reviewing courts have often passed upon the nature of the interest of one joint tenant, vis-à-vis the other or others, in joint tenancy property during the lifetime of all of them.

It has recently been held that a joint tenant's interest in the joint tenancy's right of survivorship is but a revocable "expectancy." (Tenhet v. Boswell, 18 Cal.3d 150, 155-156; accord Gwinn v. Commissioner, 287 U.S. 224, 228-229.) "A vested right is property which the law protects, while a mere *expectancy* is not property, and therefore is not protected." (Emphasis added; Hoeft v. Supreme Lodge K. of H., 113 Cal. 91, 96; Orcutt v. Ferranini, 237 Cal.App.2d

216, 220; Haldane v. Freedman, 204 Cal.App.2d 475, 479; Waring v. Wilcox, 8 Cal.App. 317, 320.)

A joint tenancy, and thus a joint tenant's expectancy in the right of survivorship, may be terminated by a voluntary, *or involuntary,* act of another joint tenant. "[O]ne of two joint tenants may unilaterally terminate the joint tenancy. . . . Severance of the joint tenancy, of course, extinguishes the principal feature of that estate—the *jus accrescendi* or *right of survivorship.* Thus, a joint tenant's right of survivorship is an expectancy . . .; it arises only . . . if the unity of the estate has not theretofore been destroyed by voluntary conveyance . . ., *by involuntary alienation under an execution* . . ., or by any other action which operates to sever the joint tenancy." (Some emphasis supplied; Tenhet v. Boswell, supra, 18 Cal.3d 150, 155-156, fn. omitted; and see other authority holding a joint tenancy terminated by an "involuntary alienation under an execution," i.e., Riddle v. Harmon, 102 Cal.App.3d 524, 526-527; Clark v. Carter, 265 Cal.App.2d 291, 294; Russell v. Lescalet, 248 Cal.App.2d 310, 312; Young v. Hessler, 72 Cal. App.2d 67, 69; Zeigler v. Bonnell, 52 Cal.App.2d 217, 219.)

Upon such a termination of the joint tenancy, the right of survivorship is extinguished, and a *tenancy in common* is created by operation of law. (Riddle v. Harmon, supra, 102 Cal.App.3d 524, 531; Russell v. Lescalet, supra, 248 Cal.App.2d 310, 312; Young v. Hessler, supra, 72 Cal.App. 2d 67, 69; Zeigler v. Bonnell, supra, 52 Cal.App.2d 217, 219.)

Joint tenants take, and hold, their respective interests as their *separate property.* It has long been held that upon

"the creation of the joint tenancy ownership, each [of the joint tenants] owned their interest therein as separate property." (*Estate of Harris*, 9 Cal.2d 649, 659; and see *In re Kessler*, 217 Cal. 32, 34; *Delanoy v. Delanoy*, 216 Cal. 23, 26; *Saunders v. Saunders*, 98 Cal.App.2d 133, 136, and cases there cited.)

It has also been held that *only* upon death of his co-tenant will a joint tenant have a "right of survivorship" under an otherwise unterminated joint tenancy. "The death became the generating source of definite accessions to the survivor's property rights." (*Gwinn v. Commissioner*, supra, 287 U.S. 224, 228, 229.)

And as this court noted in *Riddle v. Harmon*, supra, 102 Cal.App.3d 524, 531: "'If an indestructible right of survivorship is desired—that is, one which may not be destroyed by one tenant—that may be accomplished by creating a joint life estate with a contingent remainder in fee to the survivor; a tenancy in common in simple fee with an executory interest in the survivor; or a fee simple to take effect in possession in the future.'"

Manifestly, plaintiff had no "significant property interest" in her husband's separate share of the joint tenancy, of which she was deprived by "governmental action" or otherwise.

And finally we note the holding of *Pepin v. Stricklin*, 114 Cal.App. 32, 34-35, that a joint tenant situated as was plaintiff is *not* entitled to notice of levy of execution upon the other joint tenant's interest in real property.

We advert now to plaintiff's contention that the execution was void for failure of defendants, or the sheriff, to satisfy the judgment from her husband's nonexempt personal property.

Reliance is upon Code of Civil Procedure section 682 which, in relevant part, states: "If it [i.e., the writ of execution] be against the property of the judgment debtor, it must require [the sheriff] to satisfy the judgment, with interest, out of the personal property of such debtor, . . . and if sufficient personal property cannot be found, then out of his real property; . . ."

The record establishes that the subject writ of execution precisely conformed to section 682's requirements. And the sheriff's return to the superior court certified that in the levy of execution he had acted "in pursuance of the . . . writ of execution . . . ." There being no evidence to the contrary, we presume that the sheriff's "official duty has been regularly performed." (Evid. Code, § 664.) Such a rule was long ago expressed in *Hibberd v. Smith*, 67 Cal. 547, 565, holding that the purchaser of real property at an execution sale " 'may rely upon the legal presumption that [the sheriff's duties] have been duly performed [and] that the officer has found no personal property; . . .' "

Moreover, it seems unlikely that the sheriff might have found that the above-noted "Non-exempt wages," "Rental income," "Antique silver," "Used appliances," and "bank account" of a claimed value of $4,311.25 which was approximately the amount of plaintiff's husband's judgment indebtedness.

We observe further the provisions of Code of Civil Procedure section 688, providing: "All goods, chattels, moneys or other property, both *real and personal,* or any interest therein, of the judgment debtor, not exempt by law . . . *are subject to execution.*" (Emphasis added.)

The instant contention also is found devoid of merit.

Plaintiff's contention—that the trial court, in sustaining defendants' demurrer to her third amended complaint, erred in not considering the allegations and other theories of her original, and first, and second, amended complaints —is also found invalid.

It is well established that all previous complaints or amended complaints are superseded by a subsequent amended complaint. "[A]n amendatory pleading supersedes the original one, which ceases to perform any function as a pleading." (*Meyer v. State Board of Equalization,* 42 Cal.2d 376, 384; and see *Bray v. Lowery,* 163 Cal. 256, 260; *Rooney v. Gray Bros.,* 145 Cal. 753, 755; *Cross v. Tustin,* 111 Cal.App.2d 395, 399-400 [cert. den., 344 U.S. 900]; *O'Melia v. Adkins,* 73 Cal.App.2d 143, 147; *Butler v. Wyman,* 128 Cal.App. 736, 739.)

Moreover, we observe plaintiff's attorney's concession in the trial court, at the hearing on defendants' demurrer to the third amended complaint, that earlier causes of action "have been abandoned and are no longer an issue."

We reach the appellate contention that the third amended complaint nevertheless stated a cause of action for *equitable redemption.*

It is conceded that neither plaintiff nor her husband had made timely, or other, attempt to redeem the subject property according to the *statutory* provisions of Code of Civil Procedure sections 700a-707. Instead, reliance is upon *Smith v. Kessler*, 43 Cal.App.3d 26, 31, holding that such a failure "is not a bar to later redemption where equitable considerations call for such relief."

Smith v. Kessler holds (p. 32) that such equitable redemption of property from an execution sale may be allowed, where the purchaser had paid "a grossly inadequate price" *and* had been guilty of "manifest unfairness."

Here the third amended complaint alleged no "manifest unfairness," and although it conclusionally alleged "a grossly inadequate purchase price," the above-noted facts judicially noticed by the court indicated the contrary. No reasonable trier of fact, we opine, could conclude that a judgment creditor—paying the full amount of his judgment, i.e., $4,127.63, for distressed real property, "valued at more than $15,000.00 over and above all encumbrances" (as alleged) but subject to the concern that holders of any or all of the many prior trust deed, tax, and judgment, liens might demand payment or alternatively foreclose—had paid a "grossly inadequate purchase price," or was guilty of "manifest unfairness."

The trial court reasonably concluded that plaintiff's third amended complaint stated no cause of action for equitable redemption.

Plaintiff's remaining contention is that she had "set forth a cause of action for establishing . . . a constructive trust," based among other things on defendants' "*fraud*."

We find no allegation of the third amended complaint charging fraud or other basis of support, for a finding of a constructive trust.

And it is notable that plaintiff's *second* amended complaint had charged defendants with certain fraudulent representations to her deceased husband. The record shows that upon defendants' motion for summary judgment on that pleading plaintiff, for lack of such proof, chose to abandon the issue of fraud by filing her *third* amended complaint, a circumstance with scant appeal to equity.

The contention is meritless.

For these several reasons the judgment of dismissal will be affirmed.

The judgment of dismissal is affirmed. The appeal from an order sustaining demurrer without leave to amend is dismissed.

ELKINGTON, J.

I concur:
RACANELLI, P. J.

I concur in the Result:
NEWSOM, J.

45909

Fenz v. Burke, et al.

By the Court: The petition for rehearing is denied.

Dated: April 13, 1981

Racanelli, P. J.

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 1, Civil No. 45909

In the Supreme Court of the State of California

In Bank

FENZ

vs.

BURKE, et al.

[Filed May 20, 1981]

Appellant's petition for hearing DENIED.

/s/ BIRD
Chief Justice

Opposition

Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-326

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

RUTH M. FENZ,
Petitioner,

VS.

THE SUPREME COURT OF THE STATE OF CALIFORNIA,
Respondent;

RICHARD O. BURKE and PATRICIA ANNE BURKE,
Real Parties in Interest.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL J. BRADY,
1125 Marshall Street
Redwood City, CA 94063
Telephone: (415) 364-8200
Counsel for Real Parties in Interest

ROPERS, MAJESKI, KOHN,
BENTLEY, WAGNER & KANE
1125 Marshall Street
Redwood City, CA 94063
Telephone: (415) 364-8200
Of Counsel

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Constitutional provisions and statutes involved	2
Statement of the case	14
Argument	14

TABLE OF AUTHORITIES CITED

Cases

Board of Regents v. Roth 408 U.S. 564, 577; 92 S.Ct. 2701, 2709; 33 L.Ed.2d 548 (1972) 17

Consol. Con. Co. v. McConnell 40 Cal.App. 443, 446; 180 P. 842 (1919) 16

Marelli v. Keating 208 Cal. 528, 530 (1929) 16

Senn v. Tile Layers Protective Union, Local No. 5 301 U.S. 468; 57 S.Ct. 857; 81 L.Ed. 1229 (1937) 17

Young v. Hessler 72 Cal.App.2d 67; 164 P.2d 65 (1945) 16

Statutes

California Civil Code:

Section 1241 ..... 2, 16

California Code of Civil Procedure:

Section 542 (Repealed 12/31/76) 2, 16

Section 702 ..... 12, 17

Constitution

United States Constitution:

Fourteenth Amendment 14, 15

No. 81-326

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

RUTH M. FENZ,
Petitioner,

VS.

THE SUPREME COURT OF THE STATE OF CALIFORNIA,
Respondent;

RICHARD O. BURKE and PATRICIA ANNE BURKE,
Real Parties in Interest.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard O. Burke and Patricia Anne Burke, real parties in interest herein, pray that a Writ of Certiorari not be issued to review the judgment of the Supreme Court of California entered on May 20, 1981 in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

California Civil Code

§ 1241. Execution or forced sale; when subject to

The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead is recorded, and which, at the time of such recordation, constitutes liens upon the premises.

2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendor's liens upon the premises.

3. On debts secured by encumbrances on the premises executed and acknowledged by husband and wife, by a claimant of a married person's separate homestead, or by an unmarried claimant.

4. On debts secured by encumbrances on the premises, executed and recorded before the declaration of homestead was filed for record. (As amended Stats. 1957, c. 1317, p. 2639, § 1; Stats. 1959, c. 1805, p. 4290, § 2.)

California Code of Civil Procedure

§ 542. [Manner in which property attached.] The sheriff, constable, or marshal, to whom the writ is directed and delivered, must, upon receipt of instructions in writing, signed by the plaintiff or his attorney of record, and containing a description of the property, and in the case of real property or growing crops the name of the record owner of the real property to be attached, or upon which the crops are

growing, execute the same without delay, and if the undertaking mentioned in Section 540 of this code be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by recording with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached, and by serving an occupant of the property, if there is one upon the property at the time service is attempted, with a similar copy of the writ, description and notice, or if there is no occupant then on the property, then, by posting the same in a conspicuous place on the property attached. Service upon the occupant may be made by leaving said copy of the writ, description and notice with the occupant personally, or, in his absence, with any person, of suitable age and discretion, found upon the property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household. Where the property described in the notice consists of more than one distinct lot, parcel or governmental subdivision and any of such lots, parcels, or governmental subdivisions lie with relation to any of the others so as to form one or more continuous, unbroken tracts, one service or posting need be made as to each such continuous, unbroken tract.

1a. Growing crops (which, until severed, shall be deemed personal property not capable of manual delivery), growing upon real property standing upon the records of the county in the name of the defendant, must be attached by recording with the recorder of the county a copy of the

writ, together with a description of the growing crops to be attached, and of the real property upon which the same are growing, and a notice that such growing crops are attached in pursuance of the writ, and by serving an occupant of the real property, if there is one upon the real property at the time service is attempted, with a similar copy of the writ, description and notice, or if there is no occupant then on the real property, then, by posting the same in a conspicuous place on the real property. Service upon the occupant may be made by leaving said copy of the writ, description and notice with the occupant personally, or, in his absence, with any person, of suitable age and discretion, found upon the real property at the time service thereof is attempted and who is either an employee or agent of such occupant or a member of his family or household. Where the real property described in the notice consists of more than one distinct lot, parcel or governmental subdivision, and any of such lots, parcels or governmental subdivisions lie with relation to any of the others so as to form one or more continuous unbroken tracts, one service or posting need be made as to each such continuous unbroken tract.

Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value, unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and after due notice to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such

property shall be made in the same manner that property is sold on execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

2. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached in the same manner as is real property standing upon the records of the county in the name of the defendant by the provisions of subdivision 1 of this section and the notice of attachment shall state that the real property therein described, and any interest of the defendant therein held by or standing on the records of the county in the name of such other person (naming him), are attached. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if within the county. The recorder must index such attachment when recorded, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands of record.

2a. Growing crops (which, until severance, shall be deemed personal property not capable of manual delivery), or any interest therein, belonging to the defendant, and growing upon real property held by any other person or standing upon the records of the county in the name of any

other person, must be attached in the same manner as growing crops growing upon real property standing upon the records of the county in the name of the defendant are attached by the provisions of subdivision 1a of this section, and the notice of attachment shall state that the crops therein described or any interest of the defendant therein, held by, or standing upon the records of the county in the name of, such other person (naming him), are attached in pursuance of the writ. In addition, a similar copy of the writ, description and notice shall be delivered to such other person, or his agent, if known and within the county, or left at the residence of either, if known and within the county. The recorder must index such attachment when recorded, in the names of both the defendant and of the person by whom the real property is held, or in whose name it stands on the record.

Whenever growing crops have been attached under the provisions of this subdivision, which will greatly deteriorate in value unless properly cultivated, cared for, harvested, packed or sold, the court issuing such writ, upon application of the person in whose favor the writ runs, and with or without notice as the court directs to the owner of said property, may direct the sheriff to take possession of said property and to cultivate, care for and preserve the same and, when necessary, harvest, pack and sell such property. Any sale of such property shall be made in the same manner that property is sold under execution and the proceeds must be retained by the sheriff to be applied to the satisfaction of any judgment which may be recovered in the action in which said writ is issued. The court shall order said applicant to pay such expenses in advance if

the court may deem it proper, or may direct that the whole or any part of such expenses be paid from the proceeds of any sale of such property.

3. Personal property, capable of manual delivery, in the possession of the defendant, must be attached by taking it into custody. When the personal property is used as a dwelling, such as a housetrailer, mobilehome, or boat, the same is to be attached by placing a keeper in charge of the property, at plaintiff's expense, for at least two (2) days. At the expiration of said period the officer shall remove its occupants, and take the property into his immediate custody, unless other disposition is made by the court or the parties to the action. Whenever a levy under attachment or execution shall be made on personal property, other than money, or a vehicle required to be registered under the Vehicle Code belonging to a going concern, then the officer making the levy must, if the defendant consents, place a keeper in charge of said property levied upon, at plaintiff's expense, for at least two days, and said keeper's fees must be prepaid by the levying creditor. During said period defendant may continue to operate in the ordinary course of business at his own expense provided all sales are for cash and the full proceeds are given to the keeper for the purposes of the levy unless otherwise authorized by the creditor. After the expiration of said two days the sheriff, constable, or marshal shall take said property into his immediate possession unless other disposition is made by the court or the parties to the action.

4. In cases where the sheriff, constable, or marshal is instructed to take into possession personal property capable

of manual delivery, whether the same is to be placed in a warehouse or in custody of a keeper, the sheriff, constable, or marshal shall require, as a prerequisite to the taking of such property, that in addition to written instructions the plaintiff or his attorney of record deposit with the sheriff, constable or marshal, a sum of money sufficient to pay the expenses of taking and keeping safely said property for a period not to exceed 15 days. In the event that a further detention of said property is required, the sheriff, constable or marshal must, from time to time, make written demand upon the plaintiff or his attorney for further deposits to cover estimated expenses for periods not to exceed five days each. Such demand must be served as provided in Section 1011 of this code, or by depositing such notice in the post office in a sealed envelope, as first-class registered mail, postage prepaid, addressed to the person on whom it is served at his last known office or place of residence. In the event that the money so demanded is not paid, the sheriff, constable or marshal shall release the property to the person or persons from whom the same was taken. There shall be no liability upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section shall have been fully complied with. There shall be no liability upon the part of the sheriff, constable or marshal, either to the plaintiff or the defendant for loss by fire, theft, injury or damage of any kind to personal property capable of manual delivery while in the possession of the sheriff, constable or marshal either in a warehouse or in the custody of a keeper or en route to or from a warehouse unless the sheriff, constable or mar-

shal shall be negligent in his care or handling of the property.

5. With the exception of earnings of the defendant which are exempt as provided in Section 690.6, debts, credits, judgments, and other personal property not capable of manual delivery shall be attached by leaving with the persons owing such debts, or having in his possession, or under his control, such credits and other personal property, or with his agent or, in the case of a corporation, with the president of the corporation, vice president, secretary, assistant secretary, cashier, or managing agent thereof, a copy of the writ, and, if the demand as stated in the writ does not exceed three hundred dollars ($300) exclusive of interest, attorney's fees and costs, a copy of the complaint in the action from which the writ issued, and, in every case, a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ. However, whenever a judgment has been attached under the provisions of this subdivision, a copy of the writ and notice shall be filed in the action from which the judgment arose and served upon the judgment creditor of such action. However, debts owning to the defendant by any of the following financial institutions: (a) banks; (b) savings and loan associations; (c) title insurance companies or underwritten title companies (as defined in Section 12402 of the Insurance Code); (d) industrial loan companies (as defined in Section 18003 of the Financial Code), maintaining branch offices, or credits or other personal property whether or not the same is capable of manual delivery, belonging to the defendant and

in the possession of or under the control of such financial institution shall be attached by leaving a copy of the writ and the notice, together with a copy of the complaint if required hereunder, with the manager or other officer of such financial institution at the office or branch thereof at which the account evidencing such indebtedness of the defendant is carried, or at which such financial institution has credits or other personal property belonging to the defendant in its possession or under its control; and no attachment shall be effective as to any debt owing by such financial institution if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served.

6. When checks, drafts, money orders and other orders for the withdrawal of money from a banking corporation or association, the United States, any state or public entity within any state, payable to the defendant or judgment debtor on demand, come into the possession of a levying officer under a writ of attachment or execution, the sheriff, constable, or marshal, to whom the writ is directed and delivered, shall promptly thereafter endorse the same and present, or cause the same to be presented, for payment. The sheriff, constable, or marshal shall endorse such check, draft, money order or other order for the withdrawal of money by writing the name of the defendant or judgment debtor thereon and the name and official title of the officer making the levy with the statement that such endorsement is made pursuant to levy of writ of attachment or execution and giving the title of court and cause in which such

writ was issued, and such endorsement shall be sufficient endorsement and no banking corporation or association or public entity on which said check, draft, money order or other order for the withdrawal of money is drawn shall incur any liability to any person, firm or corporation by reason of paying to such officer such check, draft, money order or other order for withdrawal of money by reason of such endorsement, nor shall the officer making the levy incur any liability by reason of his endorsing and presenting for and obtaining payment of such check, draft, money order or other order for the payment of money; provided, however, that the funds or credit resulting from the payment of such check, draft, money order or other order for withdrawal of money shall be held by said officer subject to the levy of said writ of attachment or execution. If it appear from the face of such check, draft, money order or other order for the withdrawal of money that the same has been tendered to the defendant or judgment debtor in satisfaction of a claim or demand and that endorsement thereof shall be considered a release and satisfaction by defendant or judgment debtor of such claim or demand, then, in such event, the officer making the levy shall not endorse said check, draft, money order or other order for the withdrawal of money unless the defendant or judgment debtor shall first endorse the same to the officer making the levy; provided, however, that if said defendant shall not endorse said check, draft, money order or other order for withdrawal of money to the officer making the levy, said officer may thereafter hold such check, draft, money order or other order for the withdrawal of money subject to such levy and shall incur no liability to the defendant or judgment debtor

or to any other person, firm or corporation for delay in presentment of the same for payment.

§ 702. [Time and manner of redemption: Proceedings on disagreement as to amount]

The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within 12 months after the sale on paying the purchaser the amount of his purchase, with two-thirds of 1 percent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes, and any reasonable sum for fire insurance, maintenance, upkeep, or repair of the improvements upon the property, and any sum paid on a prior obligation secured by the property to the extent such payment was necessary for the protection of his interest which the purchaser may have paid thereon after purchase, and interest on such amounts, and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest. If judgment debtor, redemptioner, or tenant in possession, refuse the right of entry to the purchaser, his agent or contractor, such purchaser may petition the court, out of which execution or order authorizing the sale, was issued, in the same manner as hereafter provided for determining the amount due to the purchaser in the event of a disagreement, and the court may issue an order authorizing purchaser, his agent or contractor, during reasonable hours, to repair and maintain the premises.

In the event there shall be a disagreement between the purchaser and redemptioner as to whether any sum de-

manded by the purchaser is a proper charge to be added to the amount required for redemption, the proposed redemptioner shall thereupon pay to the clerk of the court out of which execution, or order authorizing the sale, was issued the amount necessary for redemption, less the amount in dispute, and shall at the same time file with said clerk a petition in writing setting forth specifically the item or items demanded to which he objects, together with his reason for such objections, and asking that such amount be determined by the court; said clerk shall thereupon fix a day, not less than 5 nor more than 10 days from the date of such filing, for the hearing of said objections; a copy of said petition, together with a notice of hearing giving the time and place thereof, shall be served by the person seeking redemption, or his attorney, upon the purchaser not less than two days before the day of hearing; upon the day fixed the court in which the order of sale or execution was originally issued shall determine, by order duly entered in the minutes of said court, the amount required for redemption, either upon affidavit or evidence satisfactory to the court; and when the amount has been so determined, in the event the amount theretofore deposited with the clerk shall be sufficient the same shall be forthwith paid to the purchaser upon his execution of a proper certificate of redemption; in the event an additional amount to that theretofore paid to the clerk is requisite, the redemptioner shall forthwith pay such additional amount to the clerk who shall then pay the whole amount necessary to the purchaser upon his execution of a proper certificate of redemption; the certificate of redemption so issued may be deposited with the clerk for delivery to the redemptioner, or given to the redemptioner at the time of payment.

STATEMENT OF THE CASE

The trial court in this action sustained the demurrer of real parties in interest, Richard O. Burke and Patricia Anne Burke, to petitioner's Third Amended Complaint. The California State Court of Appeal unanimously affirmed the trial court's action, and the Supreme Court of California unanimously denied Mrs. Fenz' petition for hearing.

The relevant allegations of petitioner's complaint are set forth in the decision of the California Court of Appeal [Petitioner's Exhibit A, pages 2 to 4], and will not be restated here. However, it should be clarified that the sheriff of San Mateo County levied against and sold only Mr. Fenz' one-half interest in the duplex. The real parties in interest purchased a certificate of sale for only Mr. Fenz' one-half interest. Petitioner still owns the other undivided one-half interest in the duplex. Petitioner's claim is that the sheriff's sale of her husband's one-half interest in the duplex, without notice to her, violated the due process clause of the Fourteenth Amendment.

The sheriff's sale of Mr. Fenz' one-half interest took place on May 6, 1975. John Fenz died on February 15, 1977.

ARGUMENT

The issue in the present case is narrow and unique to its facts, and petitioner has stated no reason why the Court should grant certiorari. Petitioner claims that the State of California, without notice, deprived her of the right to pay her husband's debt, record a homestead, and redeem her husband's property. None of these rights has been recognized as "liberty or property" protected by the due

process clause of the Fourteenth Amendment. As this Court has recently said, *the nature of the interest at stake* is of critical import, and to obtain a protected right

> "... [a] person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth* 408 U.S. 564, 577; 92 S.Ct. 2701, 2709; 33 L.Ed.2d 548 (1972).

Here, petitioner may have wished to pay off her husband's debt, record a homestead, or redeem her husband's half of the duplex, but has not shown, and cannot show, that she had a constitutionally protected right to do so.

Moreover, the allegations of petitioner's third amended complaint do not establish that the sheriff's failure to give petitioner notice of the execution sale deprived her of the right to pay her husband's debt, record a homestead, or redeem her husband's interest in the real property. Petitioner's loss of those rights occurred independent of the sheriff's sale for the reasons that real parties in interest will now discuss.

The right to pay her husband's debt was available to petitioner from the time the debt was incurred until the day the execution sale occurred. As the Court of Appeal observed in its decision,

> "Nowhere in the third amended complaint, or in matter judicially noticed, did plaintiff allege a lack of knowledge of defendant Baron & Chestney, Inc.'s judgment against her husband . . . ." Petitioner's Exhibit A, page 5

Without such an allegation, petitioner cannot seriously claim that the lack of notice of the sheriff's sale deprived her of any right. It is no answer that petitioner could now amend to include the allegation. She had three opportunities to amend her complaint to include such an allegation, but did not do so. The California courts have long recognized that "there is a limit to which the patience of the trial court may be extended in the matter of allowing repeated attempts to amend a faulty pleading." *Consol. Con. Co. v. McConnell* 40 Cal.App. 443, 446; 180 P. 842 (1919).

Petitioner's claim that the sheriff's failure to give her notice prevented her from recording a homestead is similarly without merit. At the time petitioner claims she should have received notice of the sheriff's sale, she would have already lost her right to record a homestead prior to the lien of Baron & Chestney, Inc.'s levy of execution. Under California law then in effect, notice of the execution sale would have been sent to her after recording the writ of execution. Former Code of Civil Procedure section 542. The recording of the writ of execution created a lien on Mr. Fenz' one-half interest. *Marelli v. Keating* 208 Cal. 528, 530 [1929]). California Civil Code section 1241 specifically provides that execution or forced sale is authorized to satisfy judgments when such judgments "constitute *liens* upon the premises" [emphasis added] at the time a declaration of homestead is recorded. Thus, petitioner's recordation of a homestead after receiving notice of a sheriff's sale would not have prevented the forced sale of her husband's one-half interest. *Young v. Hessler* 72 Cal. App.2d 67; 164 P.2d 65 (1945).

Even if petitioner had received notice of the sheriff's sale, she would not have been able to redeem the real property. The right to redeem real property sold on execution is limited by California Code of Civil Procedure section 701 to the judgment debtor, his successor in interest, or a junior creditor. Petitioner did not fall into any of these categories during the period of redemption. The sheriff sold Mr. Fenz' one-half interest on execution to Baron & Chestney, Inc. on May 6, 1975 [C.T. 187]. Mr. Fenz, or a redemptioner under Civil Code section 701, then had twelve months within which to redeem the property. California Code of Civil Procedure section 702. Between May 6, 1975 and May 5, 1976, the redemption period, petitioner did not qualify as a redemptioner of the property. The earliest that petitioner could have qualified as a "successor in interest" to her husband was February 15, 1977, the date of his death. By that time, the period of redemption had long since expired, and the real parties in interest owned an undivided one-half interest in the property.

Petitioner's claim that the Court of Appeal omitted from its decision a determination of the reasonableness of attempts to give notice to petitioner misses the point. The Court of Appeal determined that Mrs. Fenz did not lose any "property interest" protected by the Fourteenth Amendment, and was therefore not entitled to notice. (Plaintiff's Appendix A, pages 6 to 9). That decision is entirely consistent with the previous decisions of this Court. *Board of Regents v. Roth* 408 U.S. 564, 577; 92 S.Ct. 2701, 2709; 33 L.Ed.2d 548 (1972); *Senn v. Tile Layers Protective Union, Local No. 5* 301 U.S. 468; 57 S.Ct. 857; 81 L.Ed. 1229 (1937).

Petitioner has not been able to show even a prima facie case that she has been deprived of either liberty or property by the State of California. On the facts petitioner has alleged in her third amended complaint, the decisions below were clearly correct. Petitioner does not assert that the decision here is in conflict with the decisions of any other Court of Appeal. Manifestly, this is a case limited to interpretation of California's law on execution sales, and does not involve any important question of constitutional law requiring a review by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari be denied.

Dated: November 4, 1981.

Respectfully submitted,

ROPERS, MAJESKI, KOHN,
BENTLEY, WAGNER & KANE

By MICHAEL J. BRADY
Attorneys for Real Parties in Interest